(3)

Supreme Court, U.S.
FILED
JUN 02 1993
OFFICE OF THE CLERK

No. 92-1773

In The

Supreme Court of the United States

October Term, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM AND THE LAW FIRM DBA SIROTE & PERMUTT, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

FRED K. GRANADE
(Counsel of Record)
STONE, GRANADE, CROSBY & BLACKBURN, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

Counsel for Respondents, Stephen R. Windom, and Sirote & Permutt, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

PARTIES TO THE PROCEEDINGS

The Petitioner in this Court is Thelma H. Walker.

Respondents in this Court are Stephen R. Windom and Sirote & Permutt, P.C.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Preservation of Constitutional Challenges 1

B. Statement of the Facts 2

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 4

I. QUESTION ONE – Due Process Argument 4

A. Petitioner Failed to Preserve Her Due Process Argument 4

B. Petitioner Has Not Been Denied Due Process 7

II. QUESTIONS TWO AND THREE – Equal Protection and Seventh Amendment Arguments 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Bankers Life and Casualty v. Crenshaw, 486 U.S. 71 (1988) 5

Hales v. First National Bank of Mobile, 380 So. 2d 797 (Ala. 1980) 8, 9

Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 (1931) 10

Kentucky v. Stincer, 482 U.S. 730 (1987) 5

Patrick v. Burget, 486 U.S. 94 (1988) 5

Pernell v. Southall Realty, 416 U.S. 363 (1974) 10

Ex Parte Peterson, 253 U.S. 300 (1920) 11

Port of Palm Beach District v. Goethals, 104 F.2d 706 (5th Cir. 1939) 11

MISCELLANEOUS

Ala. R. Civ. P. 12(c) 8

Ala. R. Civ. P. 12(f) 8

Ala. R. Civ. P. 56 ..... 8, 10

Sup. Ct. R. 10 4

No. 92-1773

In The

Supreme Court of the United States

October Term, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM AND THE LAW FIRM DBA SIROTE & PERMUTT, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Preservation of Constitutional Challenges

In the petition for writ of certiorari, Petitioner asserts a due process challenge, an equal protection challenge, and a Seventh Amendment challenge concerning the right to a jury trial. However, the record shows that Petitioner failed to raise in the courts below the due process issue asserted in her petition, and that issue was not passed upon by the courts below. Additionally, Petitioner's equal protection and Seventh Amendment challenges are not federal constitutional questions at all, and likewise those issues were not passed upon by the courts

below. Consequently, Petitioner's constitutional challenges are not properly before the Court.

B. Statement of Facts

Petitioner incorrectly states several facts in her petition, all of which are totally irrelevant to the issues asserted in her petition.

Specifically, the trial court did not refuse all discovery in the action below, indeed the court explained to Petitioner methods of discovery to enable her to obtain necessary documents.

All of Petitioner's allegations relating to the trial judge and any alleged bias are based on her own unsworn allegations, none of which she has personal knowledge of, and were never properly before the court.

SUMMARY OF ARGUMENT

In the petition for writ of certiorari, Petitioner proposes to raise three separate constitutional challenges to the Alabama Supreme Court's affirmance of the trial court's summary judgment against Petitioner. However, none of Petitioner's supposed constitutional claims merit review by this Court.

Petitioner's first challenge, a due process challenge, was neither pressed nor passed upon in the courts below. Consequently, there is nothing for this Court to review

with respect to Petitioner's due process argument. Furthermore, even if Petitioner had preserved her due process argument, it is without merit. Petitioner argues that the trial court denied Petitioner's due process by granting summary judgment on Petitioner's second amended complaint without giving Petitioner notice that the second amended complaint was being considered for summary judgment. Petitioner alternatively claims that she was denied due process when the trial court allegedly granted summary judgment without considering Petitioner's second amended complaint. Petitioner's due process arguments are premised on the assumption that the trial court allowed Petitioner's second amended complaint. The record in this case is not clear whether that assumption is correct. Furthermore, the authorities cited and relied upon by Petitioner in support of her alternative due process arguments are factually and legally distinguishable and do not support Petitioner's due process arguments. Finally, even if the Petitioner was correct that the trial court procedurally erred in granting summary judgment, the error would have been harmless since the Alabama Supreme Court specifically determined that summary judgment was properly granted as to Petitioner's second amended claim. Consequently, Petitioner's due process claim fails in all respects.

Petitioner's equal protection and Seventh Amendment arguments are equally without merit. As with Petitioner's due process arguments, neither of the lower courts passed upon Petitioner's equal protection and Seventh Amendment arguments. The reason is simple. Petitioner only made oblique references concerning the

alleged violation of her constitutional rights while rearguing the facts to the courts below. Petitioner again wishes to reargue her case to this Court.

This Court's rules provide that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. The instant petition fails to meet the criteria enumerated in Rule 10. The Alabama Supreme Court's decision does not conflict with any decision of a federal court of appeals or any decision of this Court. There are no federal constitutional questions contained in the petition for certiorari warranting review by this Court.

REASONS FOR DENYING THE PETITION

I. QUESTION ONE – Due Process Argument

A. Petitioner Failed to Preserve Her Due Process Argument

Petitioner asserts that she raised "[the] issue of due process" on several occasions in the trial court and in the Alabama Supreme Court. However, the record clearly shows that Petitioner has not timely pressed the particular due process issue asserted in her petition to either the trial court or the Alabama Supreme Court. Consequently, the trial court had no opportunity to consider or rule on this issue, and the Alabama Supreme Court was under no obligation to consider this issue and, from aught that appears from the supreme court's opinion, the supreme court did not consider it. For this reason alone, the Court need not consider Petitioner's due process argument.

Kentucky v. Stincer, 482 U.S. 730, 747 n. 22 (1987); *see also Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for writ of certiorari that have not been considered by the lower court."); *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 79 (1988) ("[T]he policies that animate the 'not pressed or passed upon below' rule . . . [include] a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.").

The only issues of "due process" asserted by the Petitioner in the trial court were oblique references to Petitioner's constitutional rights contained in her motion to recuse and related filings. However, Petitioner has never asserted the failure of the trial judge to recuse himself as grounds for reversal, and consequently those allegations did not press the due process issue contained in the petition.

Petitioner also failed to properly raise the stated due process issue before the Alabama Supreme Court, as evidenced by the following excerpt of Petitioner's briefs to the Alabama Supreme Court:

Brief to Alabama Supreme Court

> Did the trial court deprive Thelma H. Walker due process of law as guaranteed under the 14th amendment of the U.S. Constitution when it failed to allow a jury to evaluate the evidence of malicious prosecution and the obtaining of a consumer credit report under false pretenses?
>
> When Judge Reid issued a summary judgment in favor of the defendants, he deprived Thelma Walker of a trial by jury and violated Thelma

> Walker's right to pursue her cause of action under due process of law. Judge Reid prevented Thelma Walker from engaging in discovery under rule 34 and failed to enforce the rules of civil procedure related to discovery. He further failed to record documents provided to him under rule 5(e) of the Alabama Rules of Civil Procedure. Thelma Walker did not receive equal treatment under the law.

Application for Rehearing to Alabama Supreme Court

3. Violation of Walker's constitutional rights

* * *

> The Circuit Court of Baldwin County has illegally denied Thelma Walker equal protection under the laws. Judge James H. Reid, Jr. failed to uphold the state's standards in issuing summary judgment in behalf of the defendants against Thelma Walker. Walker was not treated equally under the law or in accordance with the rules of the court. Walker was deprived of a hearing on her complaint and denied due process of law. The Supreme Court has illegally affirmed the Circuit Court's actions.

Regardless of how Petitioner would now like to characterize the "due process" issues quoted above, Petitioner in no way alerted either the trial court or the Alabama Supreme Court of the due process issue she now raises in her petition of certiorari. Petitioner has long since waived the due process argument she raises in her petition. Accordingly, certiorari is due to be denied on that issue.

B. Petitioner Has Not Been Denied Due Process

Even if Petitioner had preserved her due process argument, there is no basis in fact or law to support Petitioner's argument. Petitioner's due process argument is based on the following sequence of events. Petitioner filed her original complaint on March 22, 1991, and amended it on August 19, 1991. On September 13, 1991, Respondents filed a motion for summary judgment as to all of Petitioner's claims. On September 25, 1991 the trial court heard oral argument on Respondents' motion for summary judgment and asked for specific briefs and directed no further argument would be allowed. On November 15, 1991, Petitioner filed a second amended complaint, asserting a new claim against the Respondents based on allegedly improperly obtaining a credit report. On November 18, 1991, Respondents filed a motion to strike Petitioner's amended complaint, and on January 2, 1992 the trial court granted Respondents' motion for summary judgment as to all of Petitioner's claims.

Petitioner's due process argument is first premised on the *assumptions* that the trial court first allowed her second amended complaint and then converted Respondents' motion to strike into a motion for summary judgment. Neither of these assumptions are necessarily true. The trial court failed to specifically rule on Respondents' motion to strike, and the trial court's order granting summary judgment does not delineate whether the second amended claim was even considered by the court. It is an equally plausible assumption that the trial court simply refused to allow Petitioner's second amended claim or implicitly granted Respondents' motion to

strike.[1] Moreover, even if the trial court intended to grant summary judgment as to Petitioner's second amended claim, and procedurally erred in doing so, the error would be harmless. Petitioner appealed all of her claims, including her second amended claim to the Alabama Supreme Court. The Alabama Supreme Court in its opinion determined that summary judgment was appropriate as to that claim. Consequently, if the trial court erred by including Petitioner's second amended claim in his summary judgment order, it was harmless error and did not violate Petitioner's due process rights.

Petitioner contends that the Alabama Supreme Court's decision in her case conflicts with its previous decision in *Hales v. First National Bank of Mobile*, 380 So.2d 797 (Ala. 1980). However, the *Hales* decision involved the conversion of motion to dismiss to a motion for summary judgment. Alabama's Rules of Civil Procedure provide for such a conversion, and the Rule specifically provides that "all parties shall be given reasonable opportunity to present all material" as per Rule 56 (governing summary judgment motions). Ala. R. Civ. P. 12(c). On the other hand, Alabama's Rules of Civil Procedure concerning a motion to strike provide that the court may on its own initiative at any time strike a pleading, and the Rules do not provide for any notice to the parties. Ala. R. Civ. P. 12(f). Furthermore, unlike in *Hales*, in the case at hand a summary judgment motion was already pending as to all

---

[1] The fact that assumptions must be made concerning the trial court's intentions underscores Petitioner's failure to raise this issue below so that the record could be properly developed for review by this Court.

of Petitioner's claims at the time Petitioner filed her second amended claim, and there was no need for the trial court to convert Respondents' responsive pleading into a motion for summary judgment. Thus, even if Petitioner had pressed her due process claim in the trial court and the trial court had passed upon Petitioner's due process issue, there was ample basis for the Alabama Supreme Court to distinguish Petitioner's situation from the *Hales* decision.[2]

II. QUESTIONS TWO AND THREE – Equal Protection and Seventh Amendment Arguments

A mere review of questions two and three which Petitioner poses as equal protection and Seventh Amendment issues reveals the true nature of Petitioner's arguments. Petitioner simply is unhappy with the decisions rendered by the trial court and the Alabama Supreme Court concerning her malicious prosecution claim, and

---

[2] Petitioner appears to alternatively argue that the trial court did not convert Respondents' motion to strike into a motion for summary judgment, but instead granted summary judgment as to Petitioner's first amended complaint without considering the allegations contained in Petitioner's second amended complaint. However, this again assumes that the trial court allowed Petitioner's second amended complaint. Moreover, as noted earlier, the Alabama Supreme Court *did* consider the allegations in Petitioner's second amended complaint and the supreme court specifically determined that those allegations could not support a cause of action against the Respondents. [Pet. for Cert. App. at 4-5.] Therefore, any error by the trial court in failing to consider the allegations of Petitioner's second amended complaint was harmless and could not constitute a violation of Petitioner's due process rights.

Petitioner wishes to reargue that claim to this Court. Question two ostensibly raises an equal protection question that is actually illusory. Petitioner incorrectly states the Alabama Supreme Court's holding in an attempt to create some type of conflict with a decision of the Supreme Court of Kansas.[3] However, even if the law in Alabama differed from the law in Kansas concerning the elements of a malicious prosecution claim, that difference cannot create a federal question for this Court to review.

Likewise, the supposed constitutional challenge posed in Petitioner's question three is wholly without merit. In the first place, the Seventh Amendment has no applicability to this case since it was not incorporated into the Fourteenth Amendment and applied to state procedures. *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931). Furthermore, the grant of a summary judgment under Alabama procedure does not deny any jury trial rights. Alabama has adopted the equivalent of Federal Rule 56 governing summary judgment procedure. *See* Ala. R. Civ. P. 56. The constitutionality of the Federal Rules of Civil Procedure governing summary judgment is not in question. *Cf. Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974); *see also Ex*

---

[3] Petitioner concludes that "Alabama abandoned over 100 years of case law when it decided that malice may not be inferred by a want of probable cause." [Pet. at 17.] However, the Alabama Supreme Court made no such determination in its opinion. The supreme court simply determined there to be no evidence of malice in this case. [Pet. for Cert. App. at 5-6.] Petitioner's conclusion is apparently based on her unilateral and unwarranted view that there was "unrefuted" evidence of want probable cause.

Parte Peterson, 253 U.S. 300, 309-10 (1920); *Port of Palm Beach District v. Goethals*, 104 F.2d 706, 709 (5th Cir. 1939). Consequently, Petitioner fails to raise a federal question under question three.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FRED K. GRANADE
(Counsel of Record)
STONE, GRANADE, CROSBY &
BLACKBURN, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

Counsel for Respondents, Stephen R. Windom, and Sirote & Permutt, P.C.